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Michelle A. Winters

American University Washington College of Law

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TOO MANY COOKS IN THE KITCHEN: BATTLING CORPORATE CORRUPTION IN BRAZIL AND THE PROBLEMS WITH A DECENTRALIZED ENFORCEMENT MODEL

*Michelle A. Winters**

INTRODUCTION

In June of 2013, over one million Brazilians in one hundred cities took to the streets in what have become the largest protests in Brazil in two decades.¹ Rallies began in early June when the Movimento Passe Livre (“MPL”), or Free Fare Movement, led a small demonstration demanding the reversal of a recent increase in public transport fares in the city of São Paulo from R\$3 to R\$3.20.² The MPL returned in larger numbers in the following days, and the police responded with increased brutality: beating up demonstrators and bystanders alike, throwing tear gas into classrooms on university campuses, and wounding several journalists.³

Over the next two weeks, the protests steadily gained supporters rallying over a number of decentralized issues including the need for more public services; disgust over police brutality; anger over the cost of the 2014 World Cup; gay rights; the legalization of drugs; the end of compulsory voting; abortion rights; and most especially, corruption.⁴ It is telling that these protests coincided with final verdicts in

* J.D., *cum laude*, American University Washington College of Law, 2014; B.A., The Ohio State University, 2009. I would like to thank Professors Dante Figueroa and André Paiva de Teixeira for their guidance throughout the writing process and my family for their endless love and support. This Article is dedicated to the incomparable people of Brazil who taught me the meaning of *saudade*.

¹ *Brazil Unrest: ‘Million’ Join Protests in 100 Cities*, BBC NEWS (June 21, 2013, 12:17AM), <http://www.bbc.co.uk/news/world-latin-america-22992410>.

² *See Brazilian President Dilma Rousseff ‘Proud’ of Protests*, BBC NEWS (June 18, 2013, 8:15PM), <http://www.bbc.com/news/world-latin-america-22961874> (discussing the circumstances surrounding Brazil’s mass protests).

³ *See generally* Robert Mackey, *Protests Expand in Brazil, Fueled by Video of Police Brutality*, N.Y. TIMES (June 18, 2013), http://thelede.blogs.nytimes.com/2013/06/18/protests-expand-in-brazil-fueled-by-video-of-police-brutality/?_r=0; *More than 50 Journalists Hurt in Brazil Protests*, THE DAILY STAR (June 29, 2013), <http://www.dailystar.com.lb/News/International/2013/Jun-29/222002-more-than-50-journalists-hurt-in-brazil-protests.ashx#axzz2nwwyIDfA> (chronicling the violent actions taken by Brazilian police during the mass protests).

⁴ *See* Gary Duffy, *Brazil’s Leaders Caught Out by Mass Protests*, BBC NEWS (June 17, 2013), <http://www.bbc.com/news/world-latin-america-22947466> (listing the

Brazil's biggest political corruption trial in history, the *Mensalão* (Big Monthly Payment Scandal).⁵ Indeed, a large percentage of protestors declared that they were focused on "ending the perceived impunity and lack of accountability of political leaders."⁶ Under fierce political pressure and facing historically low satisfaction ratings, in August of 2013, Brazil's President Dilma Rousseff signed law number 12.846/2013,⁷ popularly referred to as the Clean Company Law (*Lei da empresa limpa*) or Brazilian Anti-Corruption Act ("BACA").⁸

wealth of causes that protestors cited as their reasons for attending nationwide demonstrations).

⁵ See Anderson Antunes, *The Cost of Corruption In Brazil Could Be Up To \$53 Billion Just This Year Alone*, FORBES (Nov. 28, 2013), <http://www.forbes.com/sites/andersonantunes/2013/11/28/the-cost-of-corruption-in-brazil-could-be-up-to-53-billion-just-this-year-alone/> (reporting that Brazil's Attorney General referred to the Mensalão as "the most daring and outrageous corruption scheme and embezzlement of public funds ever seen in Brazil").

⁶ See John Lyons, Matthew Cowley & Paulo Trevisani, *Brazil Court Allows Corruption Case Appeals*, WALL ST. J. (Sept. 18, 2013), <http://online.wsj.com/news/articles/SB10001424127887323808204579083571863389380> (noting that the Brazilian Supreme Court's decision to hear appeals for twelve Mensalão defendants "could send shock waves through [the] country"). See also *Brazil Unrest*, *supra* note 1 (discussing the rallying cry of many of the protestors).

⁷ Decreto No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.) [hereinafter *Lei Anti-Corrupção*].

⁸ Accord Senra Gabriel Pereira da Cunha, *Lei Anticorrupção é Resposta aos Protestos*, CUNHA PEREIRA.ADV.BR (Aug. 20, 2013), <http://www.cunhapereira.adv.br/noticias/lei-anticorrupcao-resposta-protestos/> (arguing that the passage of Brazil's new anti-corruption was a direct result of the protests in the summer of 2013). In fact, as a result of the public's disgust, other anti-corruption measures are being debated by the national legislature. The Senate recently approved the Draft Law 5.900/13, which makes corruption a heinous crime, and increased the minimum prison sentence from two to four years for persons guilty of this crime, in addition to adding travel restrictions that could seriously affect the ability of executives and companies to conduct their operations when facing trial for such crimes. The legislation, which still needs to be approved by the House of Representatives, would apply to public officials who taken advantage of their position to obtain benefits or divert public resources. See *A Lei Anticorrupção Empresarial Brasileira – Novos Riscos para Empresas que Operam no Brasil*, JONESDAY.COM, <http://www.jonesday.com/pt/a-lei-anticorrupcao-empresarial-brasileira—novos-riscos-para-empresas-que-operam-no-brasil-08-16-2013/> (last visited Dec. 20, 2013) [hereinafter *Novos Riscos*].

I. A CULTURE OF CORRUPTION? THE *MENSALÃO* SCANDAL AND BRAZIL'S DECISION TO BECOME "TOUGH" ON CORRUPTION

Some have argued that corruption in Brazil is actually a product of Brazilian culture.⁹ *Jeitinho brasileiro* is a frequently used expression that refers to circumventing rules and social conventions using emotional resources, blackmail, family ties, promises, rewards, or money to obtain favors or to get an advantage.¹⁰ While *jeitinho brasileiro* typically manifests "innocently enough" in small transactions like cash payments to police officers in order to avoid speeding tickets, it can also manifest on a larger scale as corporate or political corruption.

A. *Corruption by the Numbers*

Brazil has long been party to the United Nations Convention against Corruption, the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention"), and the Inter-American Convention against Corruption.¹¹ Yet, most observers would say that the country has to this point inadequately tackled bribery in international business because of a lack of enforcement.¹² Although the country ratified the OECD Anti-Bribery Convention, in the twelve years following ratification, officials have pursued only one case and two investigations.¹³ The true reality of corruption in Brazil is much more problematic than those three isolated cases. From 2003 to 2012, the federal auditor's office fired nearly 4000 employees from public service; most firings stemmed from allega-

⁹ E.g., Lucas Gabriel Marins, *Jeitinho Brasileiro Facilita Corrupção Dizem Especialistas*, GAZETA DO POVO (June 11, 2013), <http://www.gazetadopovo.com.br/economia/conteudo.phtml?id=1423013&tit=Jeitinho-brasileiro-facilita-corrupcao-dizem-especialistas> [hereinafter *Jeitinho brasileiro facilita*] (arguing that corruption is the result of a cultural phenomenon); Mark Vasconcellos, *Lei Anticorrupção Pode Frear Rerceirização no Brasil*, CONSULTOR JURÍDICO (Feb. 7, 2014, 3:35PM), <http://www.conjur.com.br/2014-fev-07/leianticorrupcao-frear-terceirizacao-areas-lidam-governo> (noting that the culture of *jeitinho brasileiro* is hard to change).

¹⁰ STEPHANIE DENNISON & LISA SHAW, POPULAR CINEMA IN BRAZIL: 1930-2001, at 21-23 (2004); Robert M. Levine, *Jeitinho Land*, in BRAZILIAN LEGACIES 212, 212-14 (1997).

¹¹ See *United Nations Convention against Corruption Signature and Ratification Status as of 2 April 2014*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited July 26, 2014); *Brazil - OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/brazil-oecdanti-briberyconvention.htm> (last visited July 26, 2014).

¹² *Corruption by Country: Brazil*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/country#BRA> (last visited Dec. 21, 2013).

¹³ *Id.*

tions of corruption or dishonesty.¹⁴ According to a local media outlet, between 2008 and 2012, the number of individuals convicted for active and passive corruption increased by 133%.¹⁵ In 2013 alone, the federal police conducted 172 special operations to combat corruption, resulting in the arrests of 940 individuals.¹⁶ The monetary consequences of corruption are staggering: a March 2010 study conducted by the Federation of Industries of São Paulo found that each year Brazil loses 1.38% to 2.3% of its GDP (between \$26 billion and \$43 billion) to corruption.¹⁷ This study, however, does not consider the monies lost as a result of the decline in the country's ability to attract foreign investments.¹⁸

B. *The Mensalão Scandal and Political Corruption in Brazil*

Over the last six years, the *Mensalão* Scandal is the most representative example of corruption in Brazil.¹⁹ “*Mensalão*” refers to clandestine payments made by the Workers’ Party (*Partido Trabalhador* (“PT”)) to congressional allies in exchange for votes supporting its legislative agenda.²⁰ Originally discovered in 2005, “[t]he

¹⁴ *Id.*

¹⁵ Stella Dawson, *Brazil’s Corporate Bribery Law is a Step Forward but Faces Tough Scrutiny – OECD Official*, THOMSON REUTERS FOUNDATION (Nov. 22, 2013, 10:28PM), <http://www.trust.org/item/20131122222839-uqg1w/>.

¹⁶ Carlos Ayres, *How Brazil is Fighting Corruption*, FCPAMÉRICAS (Nov. 1, 2013), <http://fcpamericas.com/english/anti-money-laundering/brazil-fighting-corruption/#sthash.1R2WWu0G.dpuf>.

¹⁷ Frederick T. Stocker, *Anti-Corruption Compliance in Brazil—Addressing a Daunting Challenge*, MFRS ALLIANCE FOR PRODUCTIVITY AND INNOVATION 3 (March 2012), https://www.mapi.net/system/files/PA106_1.pdf. Brazil currently occupies 69th place in the corruption rankings by the Transparency & Anti-Corruption Initiatives of the United Nations. The organization estimates that corruption costs Brazil about R\$85 billion each year. See *Jeitinho brasileiro facilita*, *supra* note 9.

¹⁸ See generally Sidney Vianna, *Anti-corruption and Doing Business in Brazil*, ETHIC INTELLIGENCE (Jan. 10, 2012), <http://ethic-intelligence.com/experts/89-brazil-anti-corruption-trends> (arguing that corruption negatively impacts Brazil’s ability to attract foreign investments); *Jeitinho brasileiro facilita*, *supra* note 9 (arguing that to attract foreign investors and make the country more competitive, Brazil and specifically its corporations must show that they are honest).

¹⁹ See Antenor Madruga & Ana Maria Belotto, *Anti-Corruption Enforcement and Policies in Brazil: Changing Times Bring a Host of Development*, 4 DEBEVOISE & PLIMPTON FCPA UPDATE, no. 8, Mar. 2013, at 11, 13 (calling the ruling in the *Mensalão* case “the most emblematic law enforcement event in current Brazilian history”).

²⁰ See *O que foi o mensalão?*, MINISTÉRIO PÚBLICO FEDERAL (Aug. 9, 2012), <http://www.turminha.mpf.mp.br/honestidade/corruptao/mensalao/entenda-o-caso/o-que-foi-o-mensalao> (describing the scandal in a more simplified manner to educate Brazilian youths).

scandal was one of many that broke in quick succession, with others involving allegations that the state-run postal system accepted bribes for contracts and that the PT had been extorting money from illegal-betting rings in Rio de Janeiro.”²¹ The biggest name among the accused was José Dirceu, Chief of Staff under then-president Luiz Inácio “Lula” da Silva until he was forced to step down because of the scandal.²² *Mensaleiros*, as they are called, have been found guilty of crimes including bribery, money laundering, misuse of public funds, and conspiracy.²³

C. Corruption in the Private Sector

The presence of a wide range of regulatory agencies in Brazil ties corporate and political corruption together and can increase the likelihood that public officials will demand bribes.²⁴ Public procurement, and the bidding process associated with it, is one of the most commonly recognized arenas for corruption.²⁵ Nevertheless, Brazil’s extremely complex tax system is also prone to corruption.²⁶ Allegedly, tax authorities frequently request bribes “to relax assessments and inspections, to refrain from pursuing instances of alleged fraud, and for giving tax obligation reduction advice.”²⁷ The problem is so pervasive that Transparência Brasil reported in a 2003 study that more than half of Brazilian businesses received requests for bribes from tax authorities.²⁸ According to a 2009 survey, almost 70% of Brazilian business owners and top managers identify corruption as a major constraint in the corporate sector.²⁹

²¹ H.J., *What is Brazil’s “mensalão”?*, *ECONOMIST* (Nov. 18, 2013, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2013/11/economist-explains-14>. See generally *Petição* (Federal Complaint), *Ação Penal* N° 470-DF, available at http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/AP_470_Peticao_n_382072011.pdf [hereinafter *Federal Complaint*] (enumerating each of the defendants and the charges against them).

²² See Madruga & Belotto, *supra* note 19, at 11.

²³ See *Federal Complaint*, *supra* note 21, at 2. See generally *id.*; *Quadro de Reus* (*Table of Charges*), MINISTÉRIO PÚBLICO FEDERAL, available at http://www.turminha.mpf.mp.br/quadro_de_reus.pdf (containing the federal charges against each individual *Mensaleiro*).

²⁴ *Corruption by Country: Brazil*, *supra* note 13.

²⁵ See Stocker, *supra* note 17, at 3 (discussing the most corrupt sectors of Brazilian business).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Brazil Data—World Bank Enterprise Survey of Business Managers*, WORLD BANK GROUP, <http://www.enterprisesurveys.org/Data/ExploreEconomies/2009/brazil>, (last visited July 28, 2014).

Previously, Brazilian anti-corruption laws imposed liability on individuals regardless of whether they acted on behalf of, or were induced by, corporations.³⁰ Corporations, however, faced no such criminal or civil liability.³¹ The measures in place were often seen as ineffective.³²

D. A Look at the Substantive Standards Behind BACA and Combating Corruption in Brazil

BACA took effect on January 29, 2014, 180 days after its publication in the Federal Official Gazette of Brazil (*Diário Oficial da União*).³³ The Act, drawing from foreign legislation like the United States' Foreign Corrupt Practices Act ("FCPA") and the United Kingdom's Anti-Bribery Act, will bring important and immediate consequences for businesses operating in Brazil.³⁴ The Act imposes civil and administrative liability for Brazilian companies for acts of domestic and international corruption.³⁵ Foreign corporations that operate in Brazil can also be held liable for acts of corruption committed in Brazil.³⁶ This new concept of corporate liability builds on the existing

³⁰ See Stocker, *supra* note 17, at 10 (stating that unlike common law jurisdictions, civil law systems generally do not apply criminal liability to legal as opposed to natural persons).

³¹ See *id.*

³² See Stocker, *supra* note 17, at 10, 11.

³³ Agência Brasil, *Lei Anticorrupção Empresarial entra em Vigor sem Decreto de Regulamentação*, CORREIO BRAZILENSE (Jan. 29, 2014), http://www.correio.braziliense.com.br/app/noticia/politica/2014/01/29/interna_politica,410224/lei-anti-corruptcao-empresarial-entra-em-vigor-sem-decreto-de-regulamentacao.shtml.

³⁴ See generally Marcelo Figueiredo, *Impressões Preliminares sobre a Lei Anticorrupção*, GGN (Dec. 11, 2013), <http://jornalggn.com.br/noticia/impressoes-preliminares-sobre-a-lei-anticorrupcao> (giving initial impressions regarding the Anti-Corruption Act).

³⁵ Decreto No. 12,846, de 1 de Agosto de 2013, Código Civil [C.C.] (Brazilian Civil Code) de 02.08.2013 art. 2 [hereinafter Decreto No. 12,846] ("A corporate personhood shall be strictly liable, in the civil and administrative sectors, for harmful acts specified in this Act."); see also André Marques Gilberto, *Brazil's Anti-corruption "Clean Company Law" goes into Effect 1/24/14—Get Ready to Comply*, DLA Piper.COM (Aug. 12, 2013), <http://www.dlapiper.com/brazil-anti-corruption-clean-company-law-goes-into-effect-1-24-14-get-ready-to-comply/> (describing the applicability of the Anti-Corruption Law).

³⁶ Decreto No. 12,846 art. 1 (Braz.) ("The provisions of this Act apply to . . . foreign corporations that have their headquarters, a branch office, or representation in Brazilian territory, . . . even temporarily."); see also Felipe Berer et al., *Brazilian FCPA-Equivalent Signed Into Law*, AKERMAN (Aug. 5, 2013), <http://www.akerman.com/documents/res.asp?id=1745> (discussing the widespread applicability of the Anti-Corruption Act).

criminal liability of individuals who bribe foreign and domestic public officials.³⁷

Prohibited acts: Article 5 of the Brazilian Anti-Corruption Act prohibits (i) promising, offering, or giving, directly or indirectly, an undue advantage to a public official or third person related to him or her; (ii) financing, funding, sponsoring, or in any way subsidizing the practice of illicit acts under the law; (iii) using an intermediary legal entity or individuals to conceal or disguise its real interests or the identity of the beneficiaries of the wrongdoings; and (iv) hindering the investigation or audit of a government agency, a public entity, or its agents.³⁸ The Act, however, covers more than just corruption. Significant parts of BACA's prohibited acts address illegal conduct related to public tenders and public contracting.³⁹ The prohibited conduct is deliberately broad and includes not only the "actual payment or provision of any undue advantage to any public official or third party, but also the acts of offering, promising, sponsoring, or otherwise supporting such activity."⁴⁰

Strict liability: Article 2 of the Act, in contrast with its U.S. equivalent, the FCPA, holds companies strictly liable for prohibited activities, meaning that the government need not show any intent on the part of the corporate actor.⁴¹ Prosecutors need only prove that an illegal act occurred and that it benefited the company.⁴²

Sanctions: The sanctions set forth in the Anti-Corruption Act include administrative sanctions (which a public administration can apply directly) and judicial sanctions (which judges apply).⁴³ Article 6

³⁷ Decreto No. 12,846 art. 3 § 1-2 (Braz.) ("Corporate liability does not preclude individual liability of the corporation's directors or officers or any natural person, accessory, or participant in the illegal activity."); see also *Novos Riscos*, *supra* note 8 (discussing that corporate liability is in addition to the existing criminal liability of individuals who bribe foreign public officials and Brazilian).

³⁸ Decreto No. 12,846 art. 5 (I)-(IV) (Braz.); see also Jonathan R. Barr, et al., *The FCPA on Steroids: Brazil Ups the Ante in Fighting Corporate Corruption*, BAKERLAW.COM (Aug. 12, 2013), <http://www.bakerlaw.com/alerts/the-fcpa-on-steroids-brazil-ups-the-ante-in-fighting-corporate-corruption-8-12-2013/> (enumerating the prohibited acts under the Anti-Corruption Act).

³⁹ See generally Decreto No. 12,846 art. 5 (IV)(a)-(g) (Braz.).

⁴⁰ Marcelo dos Santos Barradas Correia et al., *A Comparison of the New Brazilian Anticorruption Law, the FCPA, and the UK Bribery Act*, ASS'N OF CORPORATE COUNSEL, <http://www.acc.com/legalresources/quickcounsel/cnbalfuba.cfm> (last visited Nov. 14, 2013).

⁴¹ Decreto No. 12,846 art. 2 (Braz.); see also Barr, *supra* note 38 (comparing the text of the Anti-Corruption Act with its FCPA counterpart).

⁴² See Gilberto, *supra* note 35 (discussing the strict liability nature of the Act).

⁴³ See Decreto No. 12,846 arts. 6 & 19 (Braz.) (outlining the administrative and judicial sanctions contemplated under the Act).

of the Act outlines the administrative sanctions which are: a) fines in the amounts of 0.1% to 20% of the gross revenue of the legal entity; and b) publication of the condemnatory decision.⁴⁴ Judicial sanctions under Article 19 include: a) loss of assets, rights, or valuables directly or indirectly related to the wrongdoing; b) partial suspension or interdiction of activities; c) compulsory dissolution of the legal entity; and d) prohibition from receipt of incentives and public funding.⁴⁵ In all cases, the legal entities also have to pay reparations for damages caused.⁴⁶

Leniency agreements: In spite of its stiff penalties, Chapter 5 of BACA rewards self-disclosure and full cooperation with government investigations and proceedings. An agency may allow a company to enter into a leniency agreement, which may confer the following benefits: (i) up to a two-thirds reduction in fines; (ii) a waiver of debarment; and (iii) avoidance of government publication of its decision regarding the conduct.⁴⁷ Regardless of the conditions of the leniency agreement established by the governing agency, companies must provide full restitution for damages caused.⁴⁸

Enforcement: As discussed above, the law provides for civil and administrative penalties.⁴⁹ The Act specifically charges several governmental agencies, i.e. the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica*), the Ministry of

⁴⁴ Decreto No. 12,846 art. 6(I)-(II) (Braz.); see also Carlos Ayres, *How Brazil's New Anti-Bribery Law Compares to the FCPA—Part 1*, FCPAMÉRICAS (Aug. 6, 2013), <http://fcpamericas.com/english/brazil/how-brazils-new-anti-bribery-law-compares-to-the-fcpa-part-1/#sthash.9NiNcniO.dpuf>.

⁴⁵ See Decreto No. 12,846 art. 19 (Braz.).

⁴⁶ See *id.* art. 6 § 3°. President Rousseff vetoed some of the more favorable provisions approved by the Brazilian Congress, according to which: (i) administrative penalties would be limited to the total value of the contract object of the corruption offense; (ii) some sanctions were conditioned to proof of corrupt intention; (iii) the active participation of the public official to the act could serve as mitigating factor. See Rita Motta & Steven M. Bauer, *Brazilian Anti-Corruption Law: 7 Implications and Challenges for Companies Doing Business in Brazil*, LATHAM & WATKINS CLIENT ALERT COMMENTARY, Jan. 6, 2014 No. 1629, at 3 n.7; Andy Spalding, *Brazil's President Dilma Takes a Stand*, FCPA BLOG (Aug. 4, 2013, 8:32 PM), <http://www.fcpablog.com/blog/2013/8/4/brazils-president-dilma-takes-a-stand.html>.

⁴⁷ Decreto No. 12,846 art. 16 (Braz.); see Barr, *supra* note 38 (describing possible sanctions imposed on companies found in violation of the Act).

⁴⁸ Decreto No. 12,846 art. 16 § 3 (Braz.) (“The leniency agreement does not exempt the corporate entity from its obligation to make full reparation for the damage caused.”); see also Matteson Ellis, *The Problem with Leniency Agreements in Brazil*, FCPAMÉRICAS (Jan. 7, 2014), <http://fcpamericas.com/english/brazil/problem-leniency-agreements-brazil/> (discussing the fundamentals of leniency agreements under BACA).

⁴⁹ See *supra* note 34 and accompanying text.

Justice (*Ministério da Justiça*), and the Ministry of Finance (*Ministério da Fazenda*), with the power to prosecute violations and impose applicable administrative sanctions.⁵⁰ Additionally, the highest authorities in the executive, legislative, and judicial branches at the federal, state, and municipal levels may initiate the investigation or prosecution of alleged violators at the agencies' discretion or based on petitions filed with the government.⁵¹ These agencies will be authorized to grant clemency or give reductions of any penalties.⁵² The sheer number of agencies and government entities who may prosecute corporations will undoubtedly make for inconsistent applications of law, real challenges to cooperation between the agencies, and a lack of oversight, which might lead to further corruption. For now, the Act does not provide substantive standards for these bodies to comply with its regulations. This article explores the problems associated with Brazil's diffuse enforcement model and recommends both legislative and administrative changes that will improve efficiency and effectiveness.

II. DECENTRALIZED ENFORCEMENT: THE PRIMARY FAILURE OF BACA

As previously mentioned, one of the most problematic elements of the highly touted Brazilian Anti-Corruption Act is its delegation to essentially any entity of Brazil's public administration (at the federal, state, and municipal levels) of the power to investigate possible illegal acts.⁵³ While the Act specifically states that the Comptroller General (*Controladoria-Geral da União* ("CGU")) will investigate matters involving the executive federal power for acts committed against the Brazilian public administration, enforcement of BACA will be up to the highest authority of the executive, legislative, or judicial body affected by the conduct, and the Public Prosecutor's Office in cases of civil liability.⁵⁴ This means that hundreds of federal government agencies, including the Brazilian Institute of Environment and Renewable

⁵⁰ See Decreto No. 12,846 art. 29 (Braz.).

⁵¹ See *id.* art. 8 ("The initiation of administrative proceedings and prosecution of corporate entities for determination of liability rest with the head of each agency or entity of the Executive, Legislative and Judicial Branch.").

⁵² See Juan Carlos Varela et al., *Brazil: Brazil's New Anti-Corruption Law: What Every Multinational Employer Should Know*, MONDAQ (Aug. 28, 2013), <http://www.mondaq.com/x/260016/White+Collar+Crime+Fraud/Brazils+New+AntiCorruption+Law+What+Every+Multinational+Employer+Should+Know>.

⁵³ Accord Marques Gilberto, *supra* note 35 (calling the Act's delegation of powers to essentially any entity of Brazil's public administration a pressing concern).

⁵⁴ See Decreto No. 12,846 arts. 8 & 19 (Braz.); see also Carlos Ayres, *An Extraordinary Number of Enforcement Authorities Under Brazil's New Anti-Bribery Law . . . and the Potential Negative Consequences*, FCPÁMERICAS (Jan. 10, 2014) ("Brazil has approximately 5,700 municipalities, many of which have very few people and limited resources. As a result, under the new law an extraordinary number of au-

Natural Resources (“IBAMA”), the National Health Surveillance Agency (“ANVISA”), the National Agency of Petroleum, Natural Gas, and Biofuels (“ANP”), and many others, may seek accountability of companies for acts including “not only bribery, but also fraud in public procurement settings, bid rigging, and other acts committed against public administrations” under the Act.⁵⁵ What’s more, enforcement of the BACA will be decentralized at the state or local level for those matters not involving a foreign public official or federal agency.⁵⁶ Legislators believed the diffuse enforcement model would, in practice, lead to swift punishment for violators.⁵⁷

The diffuse enforcement model is consistent with previous Brazilian anti-corruption measures; however it stands in sharp contrast with both U.S. enforcement of the FCPA and with U.K. enforcement of the Anti-Bribery Act.⁵⁸ In the United States, enforcement authority is delegated solely to the Securities and Exchange Commission and the Department of Justice.⁵⁹ These two agencies work closely together and, for the most part, “have developed a uniform and consistent approach to the enforcement of the FCPA.”⁶⁰ In the United Kingdom, the Serious Fraud Office is the law enforcement authority primarily re-

thorities – at the federal, state, and municipal levels – can investigate wrongdoing and apply administrative sanctions for the acts prohibited by the new law.”).

⁵⁵ Ayres, *supra* note 54; see *Novos Riscos*, *supra* note 8.

⁵⁶ See Sheppard Mullin Richter & Hampton LLP, *The Brazilian Anti-Corruption Act of 2013 (Act #12846)*, MONDAQ (Feb. 16, 2014), <http://www.mondaq.com/x/292696/international+trade+investment/The+Brazillian+AntiCorruption+Act+of+2013+Act+12846>.

⁵⁷ Luísa Melo, *Lei Anticorrupção Já Vale; Muitas Podem Ser Milionárias*, EXAME (Jan. 29, 2014), <http://exame.abril.com.br/negocios/noticias/a-lei-anticorrupcao-esta-em-vigor-sua-empresa-se-preparou> (according to Sérgio Seabra, Secretary of Transparency and Prevention of Corruption at CGU).

⁵⁸ Simeon M. Kriesberg & Bruno Werneck, *Anti-Corruption Compliance in Brazil: The Challenges Facing US Companies*, MAYER BROWN LLP (Dec. 8, 2010), p. 23, http://www.mayerbrown.com/files/Event/ba843f1f-ad08-4caa-b364-e4be30ef2f18/Presentation/EventAttachment/d904060a-6f0b-4c9b-8308-b6ddc378506c/12-08-10_Global_Strategies_Webinar_Brazil.pdf (describing the multiple governmental agencies responsible for enforcing anti-corruption measures including the Office of the Comptroller General’s Corruption Prevention and Strategic Information Secretariat (CGU-SPCI), the Brazilian Court of Audit (TCU), the Brazilian Central Bank (BC), and the Brazilian Securities and Exchange Commission (CVM)).

⁵⁹ See *The Foreign Corrupt Practices Act*, SMART BUSINESS ONLINE (Dec. 26, 2007), <http://www.sbnonline.com/component/k2/11-indianapolis-editions/17516#.UzC1461dVbw> (reporting that DOJ enforces all criminal provisions of the FCPA as well as some civil provisions, while SEC is responsible for pursuing civil enforcement of the FCPA against issuers of securities).

⁶⁰ See dos Santos Barradas Correia, *supra* note 40.

sponsible for investigating and prosecuting cases relating to corruption under the Anti-Bribery Act.⁶¹

This article seeks to identify and address many of the potential pitfalls of the diffuse enforcement model.

A. *Lack of Uniformity in the Application and Interpretation of BACA*

Unfortunately, the interpretation and application of the law will occur unpredictably and inconsistently, as each administrative agency will follow different procedures and will be subject to the influence of different public policies.⁶² This is a major problem because certain aspects of the law (e.g., credit for compliance programs, leniency programs in bribery cases) are new in Brazil, and agencies have no guidelines to follow for instituting these procedures.⁶³

One specific problem is the possibility of contrasting regulations in administrative actions (adjudicated before the judiciary) versus civil actions (adjudicated before the affected administrative agency) brought under BACA.⁶⁴ Another is that different municipalities may apply the law to similar facts in different ways.⁶⁵ “With so many different enforcement authorities interpreting the law and making independent decisions, incoherent outcomes and bad precedents could develop.”⁶⁶ This would result in a greater level of uncertainty for companies.⁶⁷

Corruption cases are complex.⁶⁸ Without these doctrines in place and often without proper technical knowledge or resources, indi-

⁶¹ See *id.*

⁶² See Ayres, *supra* note 54 (“Authorities in localities with little-to-no experience in dealing with matters addressed in the new law will be able to bring cases against any company doing business within their jurisdictions. This lack of specialized expertise could have negative consequences, especially with respect to the proper application of the penalties (i.e., fines of up 20% of a company’s gross earnings in the previous fiscal year and publication of the condemnatory decision) and the nuanced evaluation of compliance programs.”); Katna Baran, *Órgãos Públicos de Controle Discutem Efectividade da lei Anticorrupção*, GAZETA DO POVO (Oct. 17, 2013 4:28PM), <http://www.gazetadopovo.com.br/vidapublica/conteudo.phtml?id=1417736> (citing the juxtaposition of the standards for administrative proceedings and civil proceedings as a potential problem).

⁶³ See Ayres, *supra* note 54.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Because of the complexity of corruption, the OECD specifically requires that “complaints of bribery of foreign public officials . . . be seriously investigated by competent authorities,” and “governments of parties to the Convention should pro-

viduals will have the power to make decisions regarding the culpability of a corporation, and they could potentially “inflict irreparable harm to the image of [an innocent] company.”⁶⁹ Even with a standard set of guidelines, there is concern that the small municipalities in particular may have difficulty applying this sophisticated law.⁷⁰

Recognizing the potential danger of multiple interpretations of BACA, Jorge Hage, the current Inspector General of the CGU, held a meeting with several Brazilian law firms and corporations to discuss ways to remedy the Act’s shortcomings.⁷¹ CGU will release draft legislation that gives guidance to regulatory agencies bringing charges against corporations.⁷² Nonetheless, many Brazilian firms and corporations expressed concern about the scope of CGU’s regulatory decree, particularly whether it would apply to state, municipal, and other branches of government in addition to federal agencies.⁷³ Although the decree will apply universally, each state and county can make its own rules, as the decree is only intended to create parameters for understanding BACA.⁷⁴ Accordingly, the risk for inconsistent applications

vide adequate resources to allow effective prosecution of such bribery.” Sonia Zaheer, *Brazil’s Landmark Clean Companies Act: Comparison to The OECD Anti-Bribery Conventions and Issues*, PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 44 (unpublished comment), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417155 (citing OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Official Commentaries 27, Dec. 17, 1997, 37 I.L.M. 1).

⁶⁹ Senra Pereira da Cunha, *supra* note 8.

⁷⁰ E.g., *Nova lei Brasileira Anticorrupção traz Temor de Abusos*, ASMETRO-SN (Jan. 10, 2014), <http://www.asmetro.org.br/portal/21-clipping/2696-nova-lei-brasileira-anticorrupcao-traz-temor-de-abusos> (citing small Brazilian municipalities that have little infrastructure as a threat because they may begin to see the Act as a source of revenue); cf. J.P., *Brazil’s New Anti-corruption Law: Hard to Read*, ECONOMIST (Jan. 29, 2014 9:40PM), <http://www.economist.com/blogs/schumpeter/2014/01/brazils-new-anti-corruption-law> [hereinafter *Hard to Read*] (doubting the effectiveness of a set of federal guidelines because the country’s 27 states and 5,570 municipalities have the right to interpret the law as they see fit).

⁷¹ CGU, in English, the Office of the Inspector General of the Union, is an agency of the executive branch, responsible for internal control and corrective systems, as well as for overseeing the federal ombudsman.

⁷² See *Reunião no Instituto Ethos Debate Regulamentação da lei Anticorrupção Empresarial*, JOGOS LIMPOS, <http://www.jogoslimpos.org.br/destaques/reuniao-instituto-ethos-debate-regulamentacao-da-lei-anticorrupcao-empresarial/> (last visited Dec. 20, 2013) [hereinafter *Reunião no Instituto Ethos*].

⁷³ *Id.*

⁷⁴ *Id.*; accord Ayres, *supra* note 54 (“[T]here are already regulatory developments at the state level – the State of Tocantins has issued regulations and the State of São Paulo is also working on regulations to minimize the side effects of the decentralized approach.”).

and interpretations remains because state and local governments will maintain some flexibility to make rules and regulations.⁷⁵

B. *Lack of Efficiency*

A lack of uniformity is not the only problem with BACA's decentralized enforcement model. With so many agencies potentially seeking sanctions against the same corrupt corporations for a single transaction, there is great potential for inefficiency.

1. Coordination Poses a Challenge

Properly and effectively enforcing BACA will require substantial cooperation between government agencies.⁷⁶ For example, the Federal Prosecutor's Office (*Ministério Público*) and Courts of Auditors (*Tribunais de Contas*) must work together to jointly prosecute actions for civil liability.⁷⁷ Such cooperation poses a serious challenge, however. Potentially hundreds of agencies across the federal, state, and local level may need to coordinate their efforts to prosecute corrupt corporations. Without a network of trained staff and technological support, which are not currently in place due to the novelty of these anti-corruption measures, such cooperation could be impossible, and enforcement would be slow.⁷⁸

Nonetheless, integration between the various regulatory agencies is feasible.⁷⁹ The Control Network of Public Management (*Rede de Controle da Gestão Públicas* ("RCGP")), founded in 2009, is increasing the amount of public data that may be shared, thereby promoting the

⁷⁵ But see Alex Rodrigues, *Lei Anticorrupção Empresarial Entra em Vigor, Mas Falta Regulamentação*, AGÊNCIA BRASIL – EBC (Jan. 29, 2014 11:53AM), <http://agenciabrasil.ebc.com.br/geral/noticia/2014-01/lei-anticorruptao-empresarial-entra-em-vigor-mas-falta-regulamentacao> (stating that many state and local governments are eagerly awaiting the CGU's regulations as they will form the basis for local regulations, and arguing that all governmental agencies are interested in harmonious enforcement in order to avoid confusion and legal uncertainty).

⁷⁶ See *Reunião no Instituto Ethos*, *supra* note 72.

⁷⁷ See Baran, *supra* note 62; see also Jorge Hage, *The Brazilian Experience in Fighting Corruption*, CGU, (Oct. 2013), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDMQFjAD&url=https%3A%2F%2Fwww.canninghouse.org%2Fmedia-centre%2Fdocuments%3Fdownload%3D19%3Abrasil-s-comptroller-general-minister-jorge-hage-on-brazil-s-experience-tackling-corruption-part-1&ei=> (listing more than ten agencies with anticorruption mandates that may potentially need to partner with the CGU for effective enforcement).

⁷⁸ See Carlos Henrique Abrão, *Lei Anticorrupção Empresarial*, BRASIL247 (Nov. 11, 2013), <http://www.brasil247.com/pt/247/artigos/120430/Lei-anticorrupt%C3%A7%C3%A3o-empresarial.htm> (describing the technological challenges surrounding the decentralized enforcement approach).

⁷⁹ See Baran, *supra* note 62.

integration of intelligence agencies and training employees between the various institutions.⁸⁰

2. Stepping on Toes

Another issue with BACA is that the law fails to instruct agencies regarding how to proceed in the event that a corrupt transaction affects multiple branches of government, more than one level of government, or officials from different agencies, as the law provides several authorities in Brazil with jurisdiction to enforce its provisions.⁸¹ This creates many unanswered questions. For example, if a corporation attempts to bribe government officials at the state and federal level in a single transaction, who is responsible for seeking administrative remedies? If both the state and federal executive branches were affected, it would seem that both could initiate administrative proceedings against the responsible corporation. There is no clear authority that can proceed with a single prosecution against the corrupt corporation.

Alternatively, what happens if a corporation attempts to bribe officials in two different federal agencies? BACA gives the CGU concurrent power to conduct administrative proceedings for corruption involving the federal executive power.⁸² This seems to mean that, in the event that two federal agencies are affected, both agencies have jurisdiction and CGU could intervene at any time. This might further contribute to inefficiency if CGU takes over proceedings while the other agencies have already invested time and manpower investigating the improper behavior.

BACA also gives the “highest authority of each public body or entity” the ability to enter into leniency agreements.⁸³ This raises various questions related to bribery violations that touch multiple jurisdictions. For instance, will companies have to enter into different leniency agreements with agencies in the state of São Paulo and the state of Rio de Janeiro?⁸⁴ Moreover, it is unclear whether a company that settles with the Office of the Federal Comptroller General can force other entities to honor the settlement.⁸⁵

⁸⁰ *Id.*

⁸¹ See generally Ellis, *supra* note 48 (discussing the multiple authorities assigned with prosecuting under BACA).

⁸² See Decreto No. 12,846 art. 8 § 2 (Braz.).

⁸³ Ellis, *supra* note 48.

⁸⁴ *Id.*

⁸⁵ *Id.*

C. *Conflicts of Interest and the Potential for Greater Corruption*

A final source of potential controversy is the fact that the highest authority within each public body will preside over the proceedings concerning alleged corrupt conduct inside said body.⁸⁶ Politicians or commissioned officers normally occupy these posts.⁸⁷ Remember that for an administrative investigation, the affected agency will bring charges against the corporation allegedly in violation of BACA, and then the Chief Minister or President of that agency will adjudicate and make a final decision based on those allegations.⁸⁸ This could give rise to conflicts of interest and lead to situations of abuse, arbitrariness, and even more corruption.⁸⁹ Companies have voiced a number of specific situations where government agencies could abuse their newfound power.

In some smaller agencies, entities, or municipalities, the highest authority may have played a role in or had knowledge of the alleged illegal action or transaction under investigation.⁹⁰ Moreover, enforcement authorities could have professional or personal relationships with implicated individuals within their agency.⁹¹ This sharply increases the likelihood that corruption will not come to light because an agency has no incentive to “snitch” on itself. An agency head and her employees do, however, have incentive to conceal their involvement in alleged illegal conduct and to avoid further scandal.⁹²

In the alternative, the administrative process can be used to either punish or protect companies. Article 24 of BACA provides that the “fine and the loss of assets, rights or valuables applied” under the new law will be “allocated preferably to the public bodies or entities damaged.”⁹³ Local businesses and legal communities are worried that this feature may spur local agencies or entities (which often have budget constraints) to bring frivolous enforcement actions against companies in efforts to collect huge fines that could be allocated to their public coffers. Or, even more perverse, some agencies may use

⁸⁶ See *supra* note 49, and accompanying text.

⁸⁷ Elton Bezerra, *Advogados Alertam para Efeito Inverso de lei Anticorrupção*, CONJUR (Nov. 19, 2013), <http://www.conjur.com.br/2013-nov-19/especialistas-alertam-riesco-lei-anticorrupcao-efeito-inverso>.

⁸⁸ *Para Especialista, Empresa é a Maior Interessada em Seguir a lei Anticorrupção*, MIGALHAS (Sept. 9, 2013), <http://www.migalhas.com.br/Quentes/17,MI185896,21048Para+especialista+empresa+e+a+maior+interessada+em+seguir+a+lei>.

⁸⁹ Dos Santos Barradas Correia, *supra* note 39 (stating that the diffuse enforcement contemplated in the Act could give rise to conflicts of interest).

⁹⁰ Ayres, *supra* note 54.

⁹¹ *Id.*

⁹² Bezerra, *supra* note 87 (discussing possible illegal activities in municipal governments).

⁹³ See Ayres, *supra* note 54.

the law for further extortion or corruption by selectively applying the anti-corruption law to those organizations that do not pay bribes.⁹⁴

The most cited example centers on corrupt mayors who have an interest in harming construction companies to drive down bidding prices.⁹⁵ Specifically, government agents may blackmail businesses bidding in municipal tenders to pay backhanders.⁹⁶ The corporations must either pay the bribes or risk subjection to protracted legal proceedings.⁹⁷ If state and municipal governments do not follow clear federal guidance provided by CGU in how they implement the law, the result could be more corruption, not less.⁹⁸ The municipal level is further susceptible to this kind of corruption because the Act allows public officials and its agents to impose heavy fines depending on the current local political climate.⁹⁹ What this means is that a mayor up for re-election may become “tough on corruption” just long enough to regain his seat.¹⁰⁰

BACA increases the risk for any company relying on the government for funding or relying on the government as a major client.¹⁰¹ Yet, in an instance of impropriety, such as extortion by a government official, the affected corporation or business entity has no legal recourse. The decision of the administrative authority need not be supported by the opinion of a jury, and the legal standard for liability is remarkably low.¹⁰² Furthermore, there is no chance of appeal.¹⁰³

These problems are not exclusive to the administrative process established by BACA. On the civil liability side, driven by the Public Prosecutor, similar problems may exist. Under Brazilian law, the

⁹⁴ See *Siemens vê Risco de Abuso em lei Brasileira Anticorrupção*, EXAME (Jan. 1, 2014) <http://exame.abril.com.br/brasil/noticias/siemens-ve-risco-de-abuso-em-lei-brasileira-anticorruptao> [hereinafter *Siemens vê riscos*].

⁹⁵ See, e.g., Bezerra, *supra* note 87 (discussing possible illegal activities in municipal governments).

⁹⁶ See *Hard to Read*, *supra* note 70.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Sávio de Tarso, *Lei Anticorrupção Exige das Empresas Estrutura de Compliance*, INSTITUTO ETHOS (Nov. 6, 2013), http://www3.ethos.org.br/cedoc/lei-anticorruptao-exige-das-empresas-estrutura-de-compliance/#.UrM1R_b2PC9.

¹⁰⁰ *Id.*

¹⁰¹ See *Siemens vê riscos*, *supra* note 94.

¹⁰² See *id.*; see also *supra* note 34 and accompanying text.

¹⁰³ See Bezerra, *supra* note 87. But see Ayres, *supra* note 54 (“In the case of bribery of local officials at the Federal Executive branch level, the CGU has concurrent authority to initiate administrative proceedings against legal entities and to examine and correct proceedings handled by other authorities. While this may serve to minimize the negative impact of the decentralized approach at the Federal level, it may not be sufficient. The CGU is not expected (and probably would not have the resources) to intervene in all cases.”).

Prosecutor's Office is a functionally independent agency (or fourth branch of government).¹⁰⁴ Consequently, the process of decision-making is not subject to approval or control. Each prosecutor is free to begin an investigation into a corporation, with little chance of interference by a superior.¹⁰⁵ The citizenry's attention to issues related to corruption in Brazil, together with the independence of the Prosecutor's Office, may encourage prosecutors to prosecute cases against large companies under BACA simply because of societal pressures.¹⁰⁶ This could lead to inefficiency and frivolous investigations, and it could place a substantial burden on the judicial system.

The diffuse model of enforcement envisioned by BACA can lead to several problems. There are legitimate concerns about the efficiency of such a system, as well as the potential danger to corporations that will be subject to potentially hundreds of different sets of regulations and rules. Yet, perhaps most frightening is the possibility that the decentralization of enforcement under BACA could work against the objectives of the Act itself. The lack of oversight both for administrative agencies and the Public Prosecutor's Office might lead to further corruption as companies could be subject to pressures and attempts at blackmail in order to avoid sanctions from the very agencies that are bringing suit against them.¹⁰⁷

III. ELIMINATING THE RISKS: RECOMMENDATIONS FOR AN IMPROVED BACA

The success of the Brazilian Anti-Corruption Act and its power to reduce corruption in Brazil is entirely dependent on the agencies prosecuting and enforcing the new law.¹⁰⁸ Brazil has been a party for nearly two decades to three different international treaties battling corruption. Nevertheless, lacking adequate enforcement, the conventions did not address the problems. Perhaps prompted by last summer's protests, the *Mensalão* scandal, and a growing international discussion about corruption in the country, Brazil has taken significant steps to clean up both its corporate and political sectors. BACA

¹⁰⁴ See Mauro Figueiredo, *Ministério Público of Brazil: An Institution in Defense of Future Generations*, ELAW SPOTLIGHT (Aug. 7, 2013), <http://elawspotlight.wordpress.com/2013/08/07/ministerio-publico-of-brazil-an-institution-in-defense-of-future-generations/> (describing the role of the federal prosecutor in the Brazilian government).

¹⁰⁵ See *Novos Riscos*, *supra* note 8 (discussing the autonomy of the Public Prosecutor).

¹⁰⁶ *Id.*

¹⁰⁷ See Bezerra, *supra* note 87.

¹⁰⁸ *Contra Senra da Cunha Pereira*, *supra* note 8 ("A law, in and of itself, does not change anything. Corruption is a much more social than legal issue.").

can be extremely successful in curbing the perceived rampant corruption in Brazil, but only if agencies are willing and able to enforce it.

Ideally, the BACA should designate a specific government agency or group of agencies with responsibility for filing and pursuing both civil and administrative actions against corporate entities in violation of the Act.¹⁰⁹ Under this model, Brazil would enjoy two primary benefits: the designated agency or group of agencies would be able to develop the relevant technical expertise, and the business community would have consistent guidance, allowing corporations to implement effective internal compliance measures.¹¹⁰ To aid in its success, the legislature should consider amending the Act to delegate the enforcement of BACA to a set of specific agencies. It would seem that the CGU would be qualified to handle all prosecutions under BACA for the administrative liability, while the Public Prosecutor's Office could bring charges before the judicial branch under the civil liability section of BACA. The CGU already has exclusive responsibility over proceedings relating to foreign government officials, and has also been given the discretion to exercise jurisdiction over matters involving the federal executive branch.¹¹¹ Consolidating power into one or two agencies would lead to higher levels of efficiency, more uniform interpretations of BACA, and more consistently imposed sanctions. The CGU is uniquely qualified to handle anti-corruption litigation. As a central agency of the federal government, the CGU has a qualified technical team specialized in anti-corruption matters.¹¹² The agency has also been involved in discussions about BACA since the early stages of its legislative process, and therefore, it is familiar with the law's key features.¹¹³ Given the CGU's centralized approach and specialized expertise, one expects it to apply the law in a coherent way.¹¹⁴ In terms of efficiency, as a general rule, every CGU investigation must be concluded within a 180-day period.¹¹⁵ This would ensure that investigations and legal proceedings do not drag on, perhaps destroying the reputation and image of innocent corporations. Furthermore, affected agencies can coordinate with a single official at CGU, bringing all complaints in a single transaction rather than conducting multiple investigations and trying to contact each affected agency for information.

In lieu of this legislative change, there are several alternative solutions. First, Jorge Hage and the CGU, in their forthcoming draft

¹⁰⁹ *Accord dos Santos Barradas Correia, supra* note 40.

¹¹⁰ *Id.*

¹¹¹ *See* Decreto No. 12,846 art. 8 § 2º, art. 9, & art. 16 § 10º.

¹¹² Ayres, *supra* note 54.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Dos Santos Barradas Correia, *supra* note 40.

legislation, must set strict parameters to account for the lack of technical and legal criteria to render decisions under BACA. The Brazilian government should also incentivize reporting violations and provide protection to whistleblowers in order to encourage agency employees to report misconduct.¹¹⁶

Alternatively, Paragraph 1 of Article 8 of BACA provides for the delegation of powers, which could open the possibility that, through agreements, there could be some concentration of enforcement in a smaller number of agencies.¹¹⁷ This would hopefully allow those delegated agencies the opportunity to develop expertise in the complex field of corruption investigations and litigation and allow for more uniform decisions and impartial treatment of defendant-corporations.¹¹⁸

Finally, the legislature could create or denote an appellate body with the power to review all decisions from administrative agencies. This would provide the requisite oversight in order to reduce the risk of illegal “adjustments.”¹¹⁹

CONCLUSION

The Brazilian government has taken significant strides to combat corporate corruption. No matter their motives, BACA is a vital and sweeping piece of legislation that fights corruption by Brazilian and foreign entities. The penalties are stiff, and corporations doing business in Brazil have been quick to establish compliance divisions and began creating and implementing policies to avoid administrative and civil liability under BACA. Nevertheless, there is one particularly important shortcoming within the Act. A decentralized model of enforcement will lead to an inconsistent application of law, pose challenges to effective and cooperative enforcement between regulatory agencies, and potentially create conflict of interests. Sadly, this Act even has the potential to prompt further corruption due to lack of oversight. The Act is not beyond redemption, however. The Brazilian legislature could

¹¹⁶ Zaheer, *supra* note 68, at 47 (citing Transparency International, *Exporting Corruption Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery* 6, 23 (2013), available at http://www.transparency.org/whatwedo/pub/exporting_corruption_progress_report_2013_assessing_enforcement_of_the_oecd).

¹¹⁷ See Decreto No. 12,846 art. 8° §1° (Braz.) (“Responsibility for the initiation of administrative processes and the judgment of the legal entity for determining liability may be delegated.”).

¹¹⁸ MIGALHAS, *supra* note 88.

¹¹⁹ Bezerra, *supra* note 87 (quoting attorney Jair Jaloreto) (“Whenever there is an excessive concentration of power of decision on punishing or not punishing or on deciding whether an accused is guilty or innocent, we are faced with characteristics of the subtleties of human nature. Deviations of character and conduct are possible, some might even say predictable.”).

delegate enforcement powers to one or two regulatory agencies and/or create an appealable body that can review the decisions of all administrative bodies.

